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No. PD-0703-16

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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STEPHEN HOPPER
Appellant

v.

THE STATE OF TEXAS,

Appellee

Appellant's Response to the State's Brief on the Merits

From the Fourteenth Court of Appeals, Number 14-15-00371-CR,
Cause Number 673236 from the 339th District Court, Harris County, Texas.

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

SARAH V. WOOD
Assistant Public Defender
Harris County, Texas
State Bar Number 24048898
1201 Franklin, 13th Floor
Houston, Texas 77002
Phone: (713) 368-0016
Fax: (713) 368-9278
Sarah.Wood@pdo.hctx.net

Counsel for Appellant

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Argument

The State in this case appears to seek this Court's explicit absolution from a duty to bring cases to trial. While the practical effect of the State's victory below is to permit cases to languish for decades just because an accused fails to respond to a confusing written notice, the State now ups the ante by requesting solemn approval for its policy of procrastinated prosecution.

Explicitly, the State wants this Court to hold:

> Because the appellant and the State were equally culpable for the delay, the delay should not weigh against the State but should be treated as a neutral factor akin to an agreed continuance. (State's Brief at 5).

A careful examination of the State's brief reveals that it is actually arguing for something akin to a "detainer-waiver" rule in which a defendant is effectively barred from complaining about any delay coming after the State has filed a detainer. (*See e.g.* State's Brief at 7-8, 16). Schematically, the State largely couches this proposal in terms of a reformation of the second *Barker* factor in which blame for the delay would be assigned to a defendant due to his failure to initiate the IADA.

The State's request is based on a fundamental misapplication of the

elegant four-factored balancing test pronounced in *Barker v. Wingo*.[1] Asking this Court to enact a broad reformulation of *Barker's* second factor (reason for delay), the State fails to properly define it and fails to consider its interaction with the other factors. Although never mentioned in the State's extensive briefing, the second factor is necessarily an inquiry into the **State's** reason for the delay—which cannot logically be blamed on the fact that a defendant did nothing.[2] Whether or not a defendant fails to demand a trial is the focus of the third *Barker* factor.[3] If this Court were to follow the State's legal reasoning in this case, analysis of the second and third factors would be subsumed within one another and become meaningless.

Moreover, the State asks this Court to equate a defendant's inaction with an agreed continuance—to liken an uncounseled inmate in a foreign jurisdiction to a defendant in court with an attorney—to equate silence with affirmative conduct.

Even more, the State wants to persuade this Court that the current

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[1] *Barker v. Wingo*, 407 U.S. 514 (1972).

[2] *Gonzales v. State*, 435 S.W.3d 801, 809 (Tex. Crim. App. 2014) (second factor is "state's reason for delay," not to be confused with the third factor "defendant's assertion of his right.")

[3] *Id.* at 810.

condition of the law gives unrepresented inmates a dangerous advantage over the State. The State warns that we must prevent unfair gamesmanship carried out through… silent inaction. The only way to keep the system fair, the State argues, is by holding such inaction to be a waiver of the right to speedy trial. But as the Supreme Court noted long ago, "the equation of silence or inaction, with waiver is a fiction that has been categorically rejected by this Court…"[4]

I. The State fails to recognize that the second *Barker* factor focuses on the State's reason for delay because it is the State's duty to bring cases to trial. (State's Brief at 6-7, 25-26).

The second *Barker* factor is almost universally referred to as "the reason for delay" or "the State's reason for delay"—not "what caused the delay" as the State calls it. (State's Brief at 6-7). This is a subtle but important distinction since the second factor specifically "looks to the reason the State assigns to justify the delay."[5]

The State fails to mention the actual mode of analysis and instead contends that the second *Barker* factor is a "two-part inquiry" first weighing the respective blames of the parties for the delay. (State's Brief at 7). *Barker* made clear that the overarching goal of the four-factored test as a whole—not the

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[4] *Dickey v. Florida*, 398 U.S. 30, 49 (1970).

[5] *Gonzales*, at 809.

second factor—is to weigh the culpabilities of both parties: "The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed."[6] While the conduct of the State is the subject of the second factor, the conduct of the defendant is the focus of the third.

Similarly, in *Gonzales,* this Court noted that "the State misconstrues the analysis of the court of appeals, and the Supreme Court's holdings in Barker and its progeny, because it conflates the State's reasons for delay with whether Appellant timely asserted his right to a speedy trial."[7]

The second factor examines the State's reasons for the delay as a separate consideration precisely because the State has the ultimate responsibility for bringing cases to trial. "[S]ociety has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest."[8] *Barker* requires a special inquiry into whether that duty is being fulfilled. As Professors Dix and Schmolesky observed, "Whatever the nuances of the inquiries, the burden is on the State to justify delay."[9]

But the State urges this Court to pay little attention to "language from the

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[6] *Barker*, at 530.

[7] *Gonzales*, at 810.

[8] *Barker*, at 527.

[9] 42 Tex. Prac., Criminal Practice And Procedure § 28:13 (3d ed.)

Supreme Court" "indicating" that the "primary burden for bringing a defendant to trial rests firmly with the State." (State's Brief at 25).

The Supreme Court's language is more than just an indication that the State cannot so easily shed its duty to bring cases to trial. It is a rule echoed by this Court on a regular basis. *See, e.g. Gonzales v. State*, 435 S.W.3d 801, 809 (Tex. Crim. App. 2014) ("[T]he ultimate responsibility for such circumstances must rest with the government rather than with the defendant."); *Cantu v. State*, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008) ("The defendant has no duty to bring himself to trial; that is the State's duty."); *Zamorano v. State*, 84 S.W.3d 643, 651 (Tex. Crim. App. 2002) ("Of course, the defendant has no duty to bring himself to trial."); *Chapman v. Evans*, 744 S.W.2d 133, 137 (Tex. Crim. App. 1988) ("Both the trial court and prosecution are under a positive duty to prevent unreasonable delay.").

The State seeks to avoid any examination into whether it has fulfilled its special duty to society by reformulating the second *Barker* factor.

II. The District Attorney's Office desires to change the law to justify its official policy of delaying extradition.

Under the second *Barker* factor, the reviewing court is to determine whether the State's reasons are justifiable or unjustifiable.[10] Common reasons given by the State are crowded dockets, missing witnesses, or that the case simply slipped through the cracks. The assigned reason in this case is not so common. The delay was intentional as a matter of policy, as discussed at length in the Appellant's Brief on the Merits.

The State argues, "If noting that the State had the 'primary burden' was sufficient for deciding cases, there would never be a case where the delay was blamed on the defendant." (State's Brief at 26).

The second-factor analysis does turn to the actions of a defendant when the State points to those actions as having caused the delay in spite of its otherwise reasonable attempts to bring the case for trial. For instance, the State could attribute the delay to a defendant because he was a fugitive from justice or because the defendant's lawyers "requested extensions and continuances" as in *Vermont v. Brillon*.[11]

However, in this case it makes little sense for the State to say that Mr.

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[10] *Gonzales*, at 809.

[11] *Vermont v. Brillon*, 556 U.S. 81, 92 (2009).

Hopper caused the delay by… doing nothing. Indeed, it is undisputed that Mr. Hopper didn't do anything to delay the trial in this case. The State cannot say that its failure to bring the case to trial was caused by Mr. Hopper.[12]

In *Hartfield v. State*, the court just rejected a similar argument where, under the second *Barker* factor, the State attempted "to shift part of the blame for the delay toward Hartfield and his lawyers for their inaction between 1983 and 2006." Distinguishing Vermont v. Brillon, the court concluded, "Brillon's attorneys took affirmative actions to delay Brillon's trial. The record in this case is devoid of any actions taken by [defense attorneys] or even Hartfield from 1983 until 2006. Thus, like the trial court, we attribute no blame for the delay to Hartfield, and place blame solely on the State."[13]

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[12] The State signals that it considers the result below to be tenuous, perhaps unsustainable without the Court's agreement on its cross-petition.

> [B]ecause of the length of the delay in this case that the Fourteenth Court weighed against the State, it would not have taken much harm to have prompted a reversal. Had the defendant been able to point to a defense witness who died during the delay, or had he been able to point to any favorable evidence that went missing, no matter how slight, in a case where 18 years of delay is being weighed against the State that would have been enough to require reversal. (State's Cross-PDR, at 16; State's Brief, at 30).

[13] *Hartfield v. State*, 13-15-00428-CR (Tex. App.—Corpus Christi, January 19, 2017, Slip Op.).

It was undisputed in the trial court that the State intentionally chose not to have Mr. Hopper extradited over the course of eighteen years based on periodic reviews of the available evidence.[14] The State has never contended that it was negligent, accidental, or that the case slipped through the cracks. Therefore it is attempting to carve out a legal justification for its official policy.

III. The State's proposal of a blanket "detainer-waiver" rule fails to address the concept of waiver.

The State requests a blanket rule that its duty to bring a case to trial ends upon filing a detainer and that a defendant should not be allowed to complain about any delay past that point. (State's Brief at 16). Its "detainer-waiver" argument is based in part on an imagined alternative that otherwise the law would impose an "immutable obligation on the part of prosecutors to force defendants to have speedy trials whether they want them or not." (State's Brief at 9).

Still protesting its duty to bring cases to trial, the State asserts that it is

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[14] The State's extradition administrator testified that extradition for trial was not required and was decided on a case-by-case basis by prosecutors depending on whether witnesses were available. (3 R.R. at 10, 17, 29, 31). The prosecutor argued in closing that Mr. Hopper "doesn't have the right for the State to initiate IAD to bring him back to answer charges." (3 R.R. at 39). During oral argument at the court of appeals, the prosecutor argued the State had no legal duty to bring a defendant to trial. *Hopper* at n. 4.

"unaware of any authority for the proposition that the prosecution must force defendants to have speedy trials even if they do not want them." (State's Brief at 9). Although the State is setting up a "straw man" argument of hypothetical defendants who have waived their right to speedy trial, it is interesting to note that this authority certainly exists.

For instance, the Supreme Court explained, "It can be said that an accused released pending trial often has little or no interest in being tried quickly; but this, standing alone, does not alter the prosecutor's obligation to see to it that the case is brought on for trial. The desires or convenience of individuals cannot be controlling. The public interest in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges."[15]

Regardless, the State's mechanical argument that the failure to initiate IADA should be attributed to the defendant under the second *Barker* factor fails to consider the Court's admonition that "if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside."[16]

Under standard waiver doctrine, it is defined as "an intentional relinquishment or abandonment of a known right or privilege." It cannot be

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[15] *Strunk v. United States*, 412 U.S. 434, 439 (1973)

[16] *Barker,* at 525.

presumed from inaction.[17]

Barker held, "In ruling that a defendant has some responsibility to assert a speedy trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made."[18] The State presumes without evidence that defendants who fail to initiate IADA proceedings in response to a detainer have made a knowing and voluntary decision to waive their rights.

The State wishes for this Court to hold that defendants are subject to a detainer-waiver just as if they had enacted an agreed reset or continuance. In contrast to inmates in foreign prisons who fail to act, defendants whose attorneys sign agreed resets and move for continuance can likely be considered to have waived their ability to contest the resulting delay because they have acted affirmatively with the assistance of counsel. This has no applicability to the present case. *Barker* urges reviewing courts to distinguish "a situation in which no counsel is appointed."

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[17] *Id.*

[18] *Barker*, at 529.

IV. The State's various hypothetical defendants and caselaw examples speak to the folly of departing from a delicate and sensitive balancing process.

The State conjures images of some kind of super-defendant, given special powers by the IADA,[19] sitting in his cell in a far-off state, engaging in master gamesmanship and hoping that the District Attorney's Office falls into his dastardly plot… of doing nothing. (State's Brief at 27-28). In one scenario, a hypothetical defendant waits to make his IADA request until after the complainant dies; in another, his own witness dies. (State's Brief at 28).

These imaginary renderings do not weigh in favor of a blanket rule of detainer-waiver because, as the Court in *Barker* stated, "the nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived…"[20] A flexible, case-by-case approach is necessary since many circumstances can be envisioned weighing for or against finding waiver. Certainly, if a defendant intentionally waited until after the death of a complainant to demand a trial in order to game the system, that would be

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[19] The State's exaggeration of the powers of the IADA should be noted. The Act permits "any necessary or reasonable continuance." Tex. Crim. Proc. Code art. 51.14. Defendants encounter a great many procedural hurdles, as illustrated for example in the State's cases from Nevada and the 8th Circuit.

[20] *Barker,* at 527.

waiver. But that is not the case here nor in the vast majority of real cases.

That an individualized approach is necessary is illustrated by the State's cases. The State asserts that the case of *South Dakota v. Goodroad* shows the existence of a state-wide, detainer-waiver rule. (State's Brief at 12-13). However, the State fails to note that court took pains to justify the individual result in that case, showing the defendant testified he "knew what the IADA was, knew he had a right to a speedy trial and knew he needed to file paperwork to assert that right."[21] He was also "exceptionally familiar with the legal system," had "access to counsel," and made numerous legal filings but failed to initiate the IADA.[22] The State made no such showing in this case.

Likewise, the State's case from Montana in 1987 which it asserts stands for a blanket detainer-waiver rule is also clearly distinguishable. There, the defendant committed a crime in another state while he was on bond for the Montana crime. The State filed several detainers and promptly requested custody of him. The length of delay between the first detainer and extradition was only five months.[23] In this case, the State's only showing was a single detainer form

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[21] *State v. Goodroad*, 521 N.W.2d 433, 438 (S.D. 1994) (20 month period subject to detainer-waiver).

[22] *Id.*

[23] *State v. Grant*, 227 Mont. 181, 186, 738 P.2d 106, 109 (1987)

mailed to Nebraska by the Harris County Sheriff. The State waited 18 years instead of 5 months to request his presence for trial. Mr. Hopper did nothing to contribute to the untenable delay in this case and the blame must necessarily land on the State.

Prayer

FOR THESE REASONS, the Appellant respectfully prays that this Honorable Court deny the State's request in its petition for discretionary review.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

/s/ Sarah V. Wood
SARAH V. WOOD
Assistant Public Defender
Harris County Texas
1201 Franklin, 13th Floor
Houston Texas 77002
(713) 368-0016 (phone)
(713) 368-9278 (fax)
State Bar Number 24048898

Certificate of Service and Compliance

I certify that a copy of this Brief for Appellant has been served upon the State Prosecuting Attorney and the Harris County District Attorney's Office by electronic delivery via the e-file system and that this brief has 2,333 words according to the computer program used to draft it.

/s/ Sarah V. Wood
SARAH V. WOOD